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No. 7

In the

Supreme Court of the United States

OCTOBER TERM, 1964

NATIONAL LABOR RELATIONS BOARD, *Petitioner,*

v.

JOHN BROWN, ET AL, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF FOR RESPONDENTS

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BRIEF FOR RESPONDENTS

OPINIONS BELOW

The opinion of the Court of Appeals (R. 69-77) is reported at 319 F. 2d 7. The decision and order of the Board (R. 22-30, 4-19) are reported at 137 NLRB 73.

JURISDICTION

The judgement of the Court of Appeals was entered on June 17, 1963 (R. 77). The petition for a writ of certiorari was filed on October 16, 1963, and was granted on January 6, 1964, 375 U.S. 962 (R. 79). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1) and Section 10(e) of the National Labor Relations Act, as amended.

QUESTIONS PRESENTED

1.

Whether the Board exceeded the authority delegated to it by Congress in dictating to employer-members of a multi-employer bargaining group what economic devices were available to them in defending the integrity of their bargaining unit against a whipsaw strike.

2.

Whether the Board, in fact, properly balanced the conflict of interests between employer-members of the bargaining unit and the Union in finding that the respondent employers committed an unfair labor practice in (a) locking out their regular employees in the bargaining unit after one of their members had been struck and picketed by the Union, and (b) reopening their places of business on a limited basis after the struck member had done so.

3.

Whether, assuming the Court upholds the Board's conclusions, the Board's order is too broad because it imposes upon respondents the obligation to pay full back pay to all employees locked out rather than directing the payment of back pay only for those employees actually replaced in their jobs during the lockout.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Secs. 151, *et seq.*) are as follows:

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a) (3).

Sec. 8. (a) It shall be an unfair labor practice for an employer —

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

STATEMENT

A. The Board's Findings of Fact

The brief for the National Labor Relations Board correctly summarizes the Board's findings of fact. By way of

addition, respondents would like to emphasize, however, that respondent Safeway Stores, Incorporated, which operates two stores in Carlsbad, New Mexico, closed one of its stores for nine days during the strike and lockout and transferred managerial personnel from that store to its store which remained open during the strike and the lockout (R. 50). Respondent Brown Food Store did not hire any outside temporary replacements at all, but relied exclusively on what help could be obtained from relatives of managerial employees, plus one "sack boy" transferred to Brown's Carlsbad, New Mexico, store from his Loving, New Mexico store (R. 43). Respondent Cashway did not hire any temporary employees, but relied exclusively upon managerial employees and their relatives and personnel transferred to Carlsbad from other nearby areas for the duration of the lockout (R. 55-56). Respondent Thrifty Way Food Stores principally utilized managerial personnel and their wives and part time "box boys," many of whom were employed in this respondent's stores prior to the strike and lockout (R. 60-62).

Respondents would also like to emphasize that the Union and respondents have entered into prior successive contracts and that "The relationship between the contracting parties has always been an amicable one, and their contracts have contained union shop provisions." (R. 23). "Throughout the strike and lockout the Respondents continued in effect all employee benefits in behalf of their regular employees." (R. 23).

B. The Board's Decision and Order

The Board, with two dissenting members, concluded that the non-struck employers violated Section 8 (a) (1) and (3) of the Act in locking out their employees and using temporary replacements for the duration of the strike. The Board stated:

> "The Trial Examiner found that the initial lockout by the nonstruck employers was a permissible defensive measure to protect the solidarity of the multiemployer unit under the rule of Buffalo Linen Supply Company. However, he reasoned that the additional action of those employers in continuing to operate their businesses during the lockout had upset the delicate balancing of interests struck in the Buffalo Linen case and hence was not privileged under that decision. He therefore concluded that by continuing to operate durgin the period of the lockout, the nonstruck employers discriminated in regard to the hire and tenure of employment of their lock-out employees to discourage membership in the Union in violation of Section 8(a) (3) and (1) of the Act and that the lockout was thereby rendered unlawful. We agree with the Trial Examiner's conclusion that the nonstruck employers violated the Act by locking out their employees in the circumstances involved here." (R. 23-24).

The Board ordered respondents to cease and desist from their unfair labor practices and to reimburse their employees for lost pay (R. 27, 12-13).

C. The Decision of the Court of Appeals

The brief for the Board correctly summarizes the decision of the Tenth Circuit Court of Appeals.

QUESTION ONE RESTATED

Whether the Board exceeded the authority delegated to it by Congress in dictating to employer-members of a multi-employer bargaining group what economic devices were available to them in defending the integrity of their bargaining unit against a whipsaw strike.

SUMMARY OF ARGUMENT

The effect of the Board's decision is to grant a privileged status to the whipsaw strike. The Board states that the respondents, to resist the impact of a whipsaw strike on the integrity of the multi-employer bargaining unit, could either continue to operate their businesses with their regular employees or close down their businesses for the duration of the strike. While the Board correctly recognizes that employers may use "self help" in defense of an economic strike, it erroneously limits the employers to a choice between equally unacceptable courses of conduct.

Rather than choosing from the alternatives stated by the Board, respondents took steps calculated to strike a balance between their need to protect their investments, their obligations to the community and their obligations to their employees. In doing this, respondents did no more than protect themselves from the Union's strike. They did not act discriminatorily. Their actions were no more than were required under the circumstances.

The respondents here engaged in permissible "self help" which conduct has been recognized as proper by the Board

and the courts. In holding that the respondents could not act as they acted here, the Board is actually "picking and choosing" the economic weapons available to employers who are in the position of having to defend their bargaining units from a strike. The respondents acted solely to protect their unit and their legitimate business interests by taking minimal steps to keep their businesses open on a limited basis.

ARGUMENT

A. The Board's Decision grants a preferred status to a whipsaw strike.

The effect of the Board's decision is to grant a privileged status to a "whipsaw" strike and a legislatively unauthorized economic advantage to unions and their members. As a result of the Board's decision these respondents, and hence employer-members of other multi-employer bargaining units, are denied the right to defend against a whipsaw strike effectively, unless they are willing to risk their accumulated business investments or a permanent loss of business.

The Board's brief suggests that respondents, on the facts here, could have done one of two things: (1) Remain open with their regular employees and thus bear the brunt of the whipsaw strike intended to atomize the bargaining unit and paralyze them economically; or (2) remain closed, although the struck employer continued his business operations, thus risking a permanent loss of business and a complete loss of their perishable inventories. What choice is this? Respondents' position can be stated simply: when a struck employer-

member of a multi-employer bargaining unit utilizes replacement personnel to resist the economic consequences of a strike, and to protect his investment in his inventory, other employer members of the same bargaining unit who have lawfully locked out their employees must also be permitted to use other reasonable "self help" necessary to protect their legitimate business interests and the solidarity of the bargaining unit.

In its brief filed with this Court the Board for the first time in this case concedes the right of respondents and other members of multi-employer units to use "self help" to resist the impact of a whipsaw strike directed at the bargaining unit. This case, then, is concerned with what types of "self help" are permissible. The question to be answered is whether the Board has the right to tell employers what "self help" devices they may use in trying to maintain the integrity of their bargaining unit, absent a showing of an intention to discriminate. Respondents submit that the Board does not have this authority under the Act.

Respondents here advised the Union representatives, after having been told that the Union members had voted to strike (but not having been told which respondents might be struck or when the strike would occur), that "a strike against one was a strike against all". When Food Jet was struck, respondents locked out their employees in the bargaining unit. Had the sequence of events stopped here, this action would undoubtedly have been upheld by the Board under the rule laid down by this Court in *NLRB v. Truckdrivers Local No. 449*, 353 U.S. 87 (*Buffalo Linen*). But

Food Jet chose to defend against the strike by continuing to operate its business with temporary replacements.[1] Respondents and the Board agree that they then had the right to take action designed to place themselves "in the same boat" as the struck employer.

What then might respondents do? The Board states that:

(1) The respondents could remain closed, thus risking a permanent loss of business. This grants a substantial advantage to the struck employer thereby weakening the solidarity of the multi-employer bargaining unit, because the employer members are competitors. If non-struck employers had to remain closed while one or more of their competitor members who were struck could continue to operate, the bargaining unit would be subjected to great pressure because there would be little economic reason for the employers remaining open to negotiate as a unit while enjoying the favored position.

(2) The respondents could remain open and continue operating their businesses, while waiting to see who would be the next victim of the whipsaw strike. This, too, gives a preferred status to the whipsaw strike. Here, the whipsaw has an almost inescapable prospect of success, for working employees may subsidize their striking brothers, or await the time when, for a short while, they may be out on strike, in which case they would be subsidized by those in the unit

[1] The economics of the food industry decreed this. All grocers maintain large inventories of perishable produce, meat and dairy products. Total work stoppage for even one day would result in the loss, through spoilage, of part of this inventory. Prolonged cessation of business would cause the food store to lose all its investment in perishables, a circumstance which would be economically disastrous.

continuing to work. In practice, if the employers are required to permit their employees to continue working, they are placed in the position of financing the strike against themselves.

Laying aside considerations of policy for a moment and considering these choices from a logical point of view, respondents think that even the Board must admit there is something odd in its suggesting that they do one of two things, either of which will probably insure the Union's victory. The Board's "boat" would let the respondents sail between Scylla and Charybdis into a stone wall: they could not go forward, and they dare not go to either side.

B. The actions of respondents were calculated to protect their investments and the solidarity of the bargaining unit.

Respondents chose neither course suggested by the Board. Instead, they individually took steps calculated to strike a balance between their need to protect their investments, their obligations to the community which depended on them to supply it with food, and their obligations under the law not to treat their employees discriminatorily. Of utmost significance is the fact that respondents did not, on a man for man basis, replace their locked out employees by hire or otherwise. They used managerial employees already on their payrolls, wives of owners or managerial employees (who could hardly be said to be uninterested in the preservation of the businesses) and in a very few instances, temporary help. Respondent Safeway closed one of its stores and

transferred managerial personnel from that store to the one which remained open. Respondents Brown and Cashway hired no new outside clerical personnel at all but remained open only by using the services of managerial employees and their wives and, in Brown's case, by transferring one employee from his Loving, New Mexico store to his Carlsbad store. The Board's brief, by contrast, contains many suggestions that all or many of the locked out employees were replaced. Indeed, it leaves the impression that virtually all of the respondents' employees were "dismissed" and replaced and that respondents enjoyed business as usual. The record simply does not show this to be the case. This Court should not make the error, as did the Board, of equating the fact of remaining open with the conclusion that all the locked out employees were replaced. This was not done.

The controlling principle which the Board refuses to recognize is that the strike was directed against the integrity of the bargaining unit. According to statements made to respondents, the Union members had voted to strike. Unquestionably, the strike was aimed at the unit, seeking its destruction and the economic paralysis of its members. The objective of any whipsaw strike is to cause the employer-members the maximum amount of harassment, to create the greatest degree of pressure, and to cause the greatest amount of economic loss to them with the minimum amount of inconvenience and loss to the union and its members. If not effectively resisted, the whipsaw strike places the employers in the intolerable position of financing the strike aimed at the destruction of their unit. Is it any wonder that for years

it has been a favorite vehicle of unions? With this type of advantage, the strike must succeed. Was this advantage built into the Act by Congress? If not, can the Board by professing to balance the conflicting interests determine what economic weapons are available to employers to defend themselves against a whipsaw strike?

The Board's position is wholly unrealistic. The economic weapon employed here is the whipsaw strike. The destruction of the bargaining unit and the capitulation of the employers, either individually or collectively, to the economic demands of the union and its members are its objects. The members of the union vote whether to strike, when to strike and who to strike. They decide the strike strategy. They participate in daily strike activities. In these circumstances, it seems clear enough that the alternatives given should address themselves to the realities of collective bargaining and not simply present a Hobson's choice between equally unacceptable courses of conduct.

C. The Board and the Courts recognize the necessity of allowing employers the right to defend their businesses against a strike.

The principle of allowing an employer to choose the best method of defending against a strike has long been recognized and applied. In *Betts Cadillac Olds, Inc.*, 96 NLRB 268, at pp. 285-287 (1951) the Board recognized and applied the "self help" rationale:

> "An employer is not prohibited from taking reasonable measures, including closing down his plant, where such

> measures are, under the circumstances, necessary for the avoidance of economic loss or business disruption attendant upon a strike. This right may, under some circumstances, embrace the curtailment of operations before the precise moment the strike has occurred. The pedestrian need not wait to be struck before leaping for the curb. The nature of the measures taken, the objective, the timing, the reality of the strike threat, the nature and extent of the anticipated disruption, and the degree of resultant restriction on the effectiveness of the concerted activity, are all matters to be weighed in determining the reasonableness under the circumstances, and the ultimate legality, of the employer's action. Manifestly, where there is no real strike threat, or when the Union has given reasonable assurance against a strike, or assurances of notice sufficient to avoid disruption, there is no objective need for protective measures. By the same token, requirements as to notice may also vary from case to case. Obviously *a produce merchant dealing in perishable commodities*, or a steel company requiring days of preparation for close-down, or the operator of a press-while-you-wait cleaning establishment, or a manufacturer of tombstones, are not in the same category. Some businesses may reasonably require assurances of some kind or of differing kind with respect to the completion of work in the shop, others may need none. These principles involving the balancing of factors whose weight, both absolutely and relatively, will vary according to the circumstances in which they occur, must necessarily await specific cases." (Emphasis added).

Other Board decisions similarly recognize that employers must resort to "self help" to defend against a strike. In *Central California Chapter, Associated General Contractors of America, Inc.* 105 NLRB 767 (1953), the Board found no illegality in shutdowns of "struck and nonstruck" projects

by general contractors because of "operational difficulties" and the inability to continue on "an [economical] basis". In *Packard Bell Electronics Corp.*, 130 NLRB 1122 (1961), the Board, relying on *Betts-Cadillac*, held that a manufacturer of T-V's, radios and electronic devices, faced with an imminent strike of its service department employees, could contract out its installation and repair work to avoid customers' sets being caught in the repair shop by the strike.

In *American Brake Shoe Co. v. N.L.R.B.*, 244 F. 2d 489 (1957), reversing 116 NLRB 820 (1956), the Court of Appeals for the Seventh Circuit held that a layoff and transfer of work to another plant in anticipation of a possible strike over new contract terms was privileged, the Court noting that the employer was faced with a "permanent loss of business" if the completion of orders was delayed by a strike.

It is significant to note that in *Packard Bell* and *American Brake Shoe*, the employers went beyond the point of a lockout and attempted to protect themselves from permanent economic harm. The actions of the employers in both cases were ultimately upheld. There are few if any basic differences between the objectives of the conduct of the employers in those instances and the objectives of respondents in this case.

The right to use "self help" is further defined in *Great Falls Employers' Council, Inc.*, 123 NLRB 974 (1959), reversed 277 F. 2d 772 (1960). In this case the Board majority held that members of the employers council violated the Act when, following a lockout, they rehired employees for

one day and then laid them off again to prevent them from drawing state unemployment benefits. The Board majority concluded that the rehiring converted the legal lockout into an illegal partial lockout.

The Ninth Circuit in reversing the Board stated at 277 F. 2d 772, 775-777:

> "We consider first the asserted violation of Sec. 8 (a) (3), that Respondent's conduct here had amounted to a practice 'by discrimination in regard to the hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.' *The primary question here is, where is the discrimination?* The Board's decision furnishes no answer to this question, — it is not there discussed or even noticed. The employers' action in recalling their employees, and then releasing them was, as the Board's decision discloses, in no sense selective, — it operated as to all employees; none were preferred; none were excluded; all were treated alike. * * * [Emphasis added.]
>
> "'The language of Sec. 8 (a) (3) is not ambiguous. The unfair labor practice is for an employer to encourage or discourage membership by means of discrimination. Thus this section does not outlaw all encouragement or discouragement of membership in labor organizations; only such as is accomplished by discrimination is prohibited.' *Radio Officers etc v. National Labor Relations Board*, 347 U.S. 17, 42, 74 S. Ct. 323, 337, 98 L. Ed. 455. Whether the conduct of these employers violated some other section of the Act is something we shall have occasion to consider later in this opinion. But so far as Sec. 8 (a) (3) is concerned, to treat this conduct as discretionary [sic-discriminatory?] action under that section finds no basis in reason or in precedent.
>
> "In recognizing the propriety of the lockout, the Court in *National Labor Relations Board v. Truck Drivers*

Union, supra, 353 U.S. at page 93, 77 S. Ct. at page 646, noted that the employers were permitted to resort to it 'as an economic weapon.' By that economic weapon the employers undertook to see that the union members who were proposing to pick them off one at a time by the 'whipsaw' tactics were denied the opportunity to collect wages while they were doing this. Here, when the Board undertook to say that this economic weapon could not be made fully effective in the manner the respondents undertook to do, the Board was 'picking and choosing which economic devices of labor and management shall be branded as unlawful.' As the Court said of the Insurance Agents Union, 'the activities here involved have never been specifically outlawed by Congress.' (361 U.S. at page 498, 80 S. Ct. at page 431.) The Board here was moving 'into a new area of regulation which Congress had not committed to it.' (361 U.S. at page 499, 80 S. Ct. at page 433.) It was none of the business of the Board "to define through its processes what economic sanctions might be permitted negotiating parties in an "ideal" or "ballanced" state of collective bargaining.' (361 U.S. at page 500, 80 S. Ct. at page 433.)"

D. The Board has exceeded its authority by picking and choosing the economic weapons available to employers in defending their bargaining unit.

In *N.L.R.B. v. Insurance Agents International Union*, 361 U.S. 477, this Court affirmed the right of parties to labor negotiations to employ economic weapons of their choice while bargaining for the best terms available to them. This Court recognized that " 'collective bargaining is a brute contest of economic power somewhat masked by polite manners and voluminous statistics.' " *Id.* at p. 489, quoting Cox, The Duty to Bargain in Good Faith, 71 Harv. L. Rev.

1401, 1409. This Court further recognized that only conduct specifically condemned by the Act was made the subject of the Board's sanctions. The principle announced there is also applicable here, because the Act nowhere attempts to delineate the economic defenses available to employers in resisting a lawful strike which is calculated to bring the employers' obstinance to an end:

> "We think the Board's resolution of the issues here amounted not to a resolution of interests which the Act had left to it for case-by-case adjudication, but to a movement into a new area of regulation which Congress had not committed to it. Where Congress has *in the statute* given the Board a question to answer, the courts will give respect to that answer; but they must be sure the question has been asked." *Id.* at p. 499 (Emphasis supplied)

Respondents, to combat a lawful strike, engaged in a lockout which is not condemned by the Act and which has been specifically held to be privileged conduct when taken in defense of a whipsaw strike. This being the case, absent considerations "of a stratagem or device to evade the policies of the Act", *Id.* at p. 499, the Board is without authority to brand the particular conduct of these respondents as unlawful.[2]

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[2] *Cf.* the comment of the Fifth Circuit Court of Appeals in *Florida East Coast Ry. Co. v. Brotherhood of RR Trainmen,* ..... F. 2d ..... August 8, 1964), reported at 33 L.W. 2113:

> "To be sure, the law gives much power to organized labor. It discourages, on every hand, industrial and railroad labor strife, walkouts, lockouts, and strikes. But when the machinery of industrial peace fails, the policy in all national labor legislation is to let loose the full economic power of each. On the side of labor it is the cherished right to strike. On management, the right to operate, or at least the right to try to operate."

Respondents submit that the Board majority was wrongfully "picking and choosing which economic devices" they could use to protect the bargaining unit from disintegration.

What did the respondents actually do to protect their unit and their legitimate business interests? First, they utilized managerial employees who were already on their payrolls. These personnel were "regular employees." Does the Board suggest that an employer cannot use such employees to resist the impact of a strike? Secondly, wives of owners and wives of managerial personnel worked during the lockout. They can hardly be viewed as "replacements." Some of them already performed regular services in respondents' stores; others relieved only a short time daily. Thirdly, part-time sack boys worked. Many of them were already on the payroll at the time the lockout occurred. Finally, a very few newly hired clerical replacements were used, where necessary, with the express understanding that their jobs would last only for the duration of the strike. If these actions can be branded illegal as constituting "offensive," "retaliatory" and "discriminatory conduct," then employer members of multi-employer bargaining units have no hope of resisting in any successful way the impact of a whipsaw strike aimed at the integrity of their unit. Their right to engage in "self help" is not merely illusory; it is nonexistent. Respondents urge that their individual actions in attempting to operate their stores during the period of the strike and lockout were reasonable and purely defensive in nature, were designed to enable employers to maintain a minimal, or at best limited, operational level

in their businesses, were completely justifiable for the economic preservation of their businesses, and were, indeed, necessary to service the community with food. These actions were not devices to evade the policies of the Act.

The Board, viewing the conduct otherwise, has taken the circumstances of *Buffalo Linen*—the fact that all employers remained closed—and has hardened it, in this case, into a rule of law; for the effect of the Board's decision is to deny employers the right to engage in "self help" and resist the impact of the whipsaw on the solidarity of the bargaining unit except by selecting from alternatives, all of which are calculated to insure the strike's success. This Court should uphold the Court of Appeals' refusal to enforce the Board's order and affirm the principle laid down in *Insurance Agents, supra*, that the Board does not have the authority to "pick and choose" the economic weapons which employers use in defending against a whipsaw strike, if the rights of employers to engage in "self help" are to have any substance.

QUESTION TWO RESTATED

Whether the Board, in fact, properly balanced the conflict of interests between employer-members of the bargaining unit and the Union in finding that the respondent employers committed an unfair labor practice in (a) locking out their regular employees in the bargaining unit after one of their members had been struck and picketed by the Union, and (b) reopening their places

of business on a limited basis after the struck member had done so.

SUMMARY OF ARGUMENT

Although primary responsibility for administration of the Act is vested in the Board, the courts retain the right to review the Board's decisions to determine their correctness. This Court, in fact, reviewed the Board's findings and conclusions in *Buffalo Linen* before approving them.

The Board has clearly failed to balance the conflicting interests in this instance because the Board held that the respondents' conduct was discriminatory without any evidence on which to base such holding. This expedient of holding conduct to be discriminatory *per se* is the antithesis of a judicious balancing of interests, for it did not permit respondents to offer evidence explaining and justifying their conduct.

However, even on the evidence before the Board, the conduct of these respondents was privileged under the rule laid down by this Court in *Buffalo Linen*. Respondents' actions were defensive in nature only. The Board's holding, in essence, refuses to recognize respondents' rights as stated in *Buffalo Linen*. Instead of according respondents their rights as set forth in that case, the Board has attempted to place on respondents the onerous burden of maintaining "economic parity" with each other and with struck employers. This "economic parity" theory is wholly unworkable.

ARGUMENT

A. The Board's decision is subject to judicial review.

The Board argues, at page 7 of its brief, that the Court of Appeals erred in substituting its judgment for that of the Board. According to it:

> "This substitution of a judicial evaluation for the expert judgment of the statutory agency exceeded the court's authority under established principles announced by the Court."

The Board's brief, at page 19, states:

> "* * * the Board's conclusion in the present case is eminently sound. Even if one should disagree, however, that would not justify the decision below. The balance struck by the Board, being at worst a not unreasonable application of the statute, is within its authority, and the court of appeals exceeded its power in substituting its own judgment for that of the Board."

It is thus the Board's position that once it has exercised its expert judgment and struck what it considers to be a proper and delicate balance, its decision, except to a very limited degree, is beyond the scope of judicial review of the Courts of Appeals and this Court. Here we are faced with the novel suggestion that whether the Board's decision is right or wrong, and regardless of the reasons for that decision, it is error for the courts to review or correct it. Of course, it is primarily the task of the Board to resolve conflicts between labor and management; but courts must necessarily retain the right to review the Board's actions, and they have never suggested that administrative expertise foreclosed their right—indeed their duty—to cor-

rect obvious errors committed by the Board in exercising its delegated authority.

The decision of this Court in *Buffalo Linen* discloses that it did not merely "rubber stamp" the Board's findings and conclusions. To the contrary, this Court in *Buffalo Linen* reviewed and found, in the context of that case, that the Board had properly balanced the conflicting interests. Furthermore, the question considered by the Court of Appeals below was whether the Board, in view of this Court's decision in *Insurance Agents*, supra, could dictate to the parties which economic weapons they could use. The Court of Appeals concluded:

> "that the Board has erred in its interpretation of *Buffalo Linen*, that the acts of respondents in hiring replacements, presented as they are here against an uncluttered background, do not carry such indicia of intent as to warrant an inference of unlawful motive, that the order of the Board clearly fails to balance the legitimate interests of the parties and constitutes a prohibited determination by the Board of the economic weapons available to employers faced with a whipsaw strike" (R. 75).

B. The Board has not balanced the conflicting interests of employers and employees

The reason for the Board's decision is perhaps best revealed in this paragraph, quoted here from the Board's opinion:

> "That the nonstruck respondents, in replacing their employees, *may have acted in self-interest* rather than specifically to discourage union membership, or the Union's strike at Food Jet, *does not negate their un-*

> *lawful intent*. The Supreme Court in its recent Local 357 opinion thus took the occasion to reiterate its holding in Radio Officers that '[s]ome conduct may by its very nature contain the implications of the required intent [where] the natural foreseeable consequences of [the] actions * * * warrant the inference.'" (R. 25, emphasis supplied).

This is but another way of saying that the respondents' acts in continuing to operate their respective businesses were inherently discriminatory or, illegal, *per se*, or stated another way that respondents' *real motive* was to discriminate against their union member employees because that was the effect of their acts. To this conclusion and the Board's simple expedient of the *per se* finding respondents respectfully take exception.

Respondents suggest that this Court's *Local* 357 opinion referred to above (*Local* 357, *Etc. v. NLRB*, 365 U.S. 667) supports the rule that resort to a *per se* test of discrimination constitutes an entry by the Board into the Congressional domain:

> "Its [the Board's] power, so far as here relevant, is restricted to the elimination of discrimination * * * the Board is confined to determining whether discrimination has in fact been practiced. If hiring halls are to be subjected to regulation that is less selective and more pervasive, Congress not the Board is the agency to do it." *Id.* at p. 676.

The Board's decision and order, and the findings and conclusion of the trial examiner come to this: that a non-struck employer-member of a multi-employer bargaining unit who locks out his employees for the duration of an

economic strike against another memmber but who subsequently reopens his business on a limited basis after the struck employer itself has reopened is *conclusively presumed* to have acted discriminatorily *ab initio* toward his union member employees with a view toward discouraging their membership in the union, although, without question, the lockout standing alone is permissible conduct. Hence, evidence of motive, circumstances or reason for the action are of no consequence. In reply respondents ask: how can this conclusion be reconciled with the long history of union shop agreements in effect between the Union and these employers? How can this conclusion be reconciled with the decision to keep in force the employee benefits? How can this conclusion be reconciled with respondents' use only of managerial personnel, wives of managerial personnel, regular part time employees and in limited instances only, the hiring of a very few temporary employees expressly for the duration of the strike? How can this conclusion be reconciled with the admittedly limited nature of the respondents' operations during the lockout?

If ". . . the presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized," (*NLRB v. Insurance Agents International, supra at* P. 489), then respondents' action, far from being discriminatory *per se*, is permissible conduct unless independent evidence of anti-union bias or conduct establishes the contrary. Here, an offer of evidence in explanation of the respondents' actions was dismissed with

the curt observation that it made no difference "[w]hether it was or would have been an economic disaster for them to operate otherwise." Some balance! How can the Board claim to have "delicately" balanced the conflicting interests when it has refused to permit, let alone consider, any evidence necessary to enable it to strike a balance. In *Leonard v. National Labor Relations Board*, 205 F. 2d 355, at 357, the Court of Appeals for the Ninth Circuit stated:

> "As stated by the Fifth Circuit in *N.L.R.B. v. Dorsey Trailers*, 179 F. 2d 589, 592, the Board "is no 'Poo Bah' to loose or bind at will." Congress made it an agency not as a labor board — created to aid labor in its struggle against the employer. As shown by its name, Congress created it to be a board concerned with the administration of labor relations in which the rights of the employer are to be as jealously guarded as those of the employee. We repeat the gustatory comment, erroneously attributed to Judge Learned Hand, that the Board should be vigilant to see that what was sauce for the goose under the Wagner Act is now sauce for the gander under the Taft-Hartley Act. *Capital Service, Inc. v. N.L.R.B.*, 9 Cir., 204 F. 2d 848, 853."

C. Respondents' actions were permissible conduct under the rule laid down in Buffalo Linen.

Respondents interpret *Buffalo Linen* to mean that where unions and their members have commenced a whipsaw strike, the members of the multi-employer group may resort to reasonable "self help" to preserve the integrity of the bargaining group, absent independent evidence of discrimination or coercion prohibited by the Act. Here there was no evidence whatsoever of any anti-union bias by

any respondent. Indeed, it is difficult to conceive of a case where relations between the employers and the union were more amicable.

The Board majority expressed its rationale for its *per se* finding of discrimination in this language:

> "If the union could successfully strike one at a time, the other members of the employer unit would in ordinary circumstances continue operating to the severe economic damage of the struck member, and each in turn, could be driven to the wall in the 'whipsaw.' For this reason, if one member is shut down by a strike, the others may also shut down, but they are not required to do so. If the struck member operates through replacements, no economic necessity exists for the other members shutting down. If in those circumstances they resort to a lockout and hire replacements, it may be *reasonable* [sic] inferred that they do so not to protect the integrity of the employer unit, but for the purpose of inhibiting a lawful strike. In short, the lockout in these circumstances ceases to be 'defensive' and becomes 'retaliatory.'" (R. 26-27)

Let us examine the facts: Following the strike and lockout, and following the decision by Food Jet to replace its striking employees, the other employers continued to operate their stores on a limited basis. Safeway closed one store entirely, and operated another by transferring supervisory personnel from nearby stores; the other respondents remained open by using supervisory employees, relatives, and a few temporary employees hired only for the duration of the strike and lockout. The record, while not clear, indicates that from one to possibly four or five employees were temporarily hired *by all respondents* to work as

clerks during the period of the strike and lockout. The truth of the matter is that all respondents individually attempted to operate their respective stores on a make-shift basis. There is not a single suggestion in the record that respondents were acting in other than a purely defensive manner. Indeed, the locked out employees were told that they would be returned to their jobs when the strike was over, and the employees normally receiving fringe benefits continued to receive them during the entire course of the strike and lockout. Moreover, the record shows that "some of the businesses were down tremendously and perhaps there would be a good deal of time lapse before these normal businesses would be restored" after the termination of the strike (R. 65).

What is the conduct in this case which supports the conclusion of unlawful discrimination? There is none. As the dissenting opinion of members Rodgers and Fanning states:

> "The portion of the statute here involved speaks of *discrimination:* to find a violation of Section 8(a)(3), some form of *discrimination* must be found. The only conceivable discriminatory action in the present case, the association-wide lockout, has been found privileged by the Supreme Court. To 'infer' unlawful discrimination, as does the majority, from the performance of the further act of temporary replacement, which does not in itself discriminate against employees, causes us to suspect that the majority's real quarrel is with the Supreme Court's holding in *Buffalo Linen* that the *discrimination inherent in the original lockout was privileged.*" (R. 28-29, emphasis supplied)

Respondents submit that the use of temporary replacements, most of whom were supervisory employees and relatives of management, was not *per se*, "retaliatory" rather than "defensive." As stated in the concurring opinion in *Teamsters Local* 357 *v. NLRB*, 365 U.S. 667 (1961), where this Court struck down the expedient of the *per se* finding:

> "In general, this Court has assumed that a finding of a violation of Sec. 8(a)(3) or Sec. (b)(2) requires an affirmative showing of a motivation of encouraging or discouraging union status or activity. See, e.g., *NLRB v. Jones & L. Steel Corp.*, 301 U.S. 1, 45, 46, 81 L ed 893, 916, 57 S. Ct. 615, 108 ALR 1352; *Universal Camera Corp. v. NLRB* 340 U.S. 474, 95 L ed 456, 71 S. Ct. 456. There have, to be sure, been exceptions to this requirement, but they have been narrow ones, usually analogous to the exceptions made to the requirements for a showing of discrimination in other contexts."

See also the decision in *N.L.R.B. v. Dalton Brick and Tile Corp.*, 301 F. 2d 886 (1962).

Under the rationale of *Buffalo Linen*, respondents' action in resorting to a lockout until termination of the strike was "defensive and privileged in nature, rather than retaliatory and unlawful." *N.L.R.B. v. Truckdrivers Local No.* 449, *supra* at p. 91. As stated by this Court in that case, "although the Act protects the right of the employees to strike in support of their demands, *this protection is not so absolute as to deny self help by employers when legitimate interests of employees and employers collide.*" *id.* at p. 96 (Emphasis supplied).

D. The Board's decision renders illusory respondents' right to lockout employees to preserve the integrity of the bargaining unit.

The action of Food Jet, the picketed employer, in hiring replacements for its employees who did not report for work, seems clearly privileged here. In *N.L.R.B. v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, this Court laid down the principle that struck employers have a general right to hire replacements for strikers to "protect and continue" their businesses.

Food Jet thus chose to continue its operations with replacements, and the other respondents chose to lock out their employees to protect the integrity of the unit.[3] At this point, there was no violation of the Act. *N.L.R.B. v. Truckdrivers Local No. 449, supra*, at p. 87.[4] The Board, while recognizing the right of Food Jet to hire replacements and continue operating, reasoned that the other respondents could have continued to operate with their regular employees and that there was, therefore, no economic necessity for the other respondents to use temporary replacements. The Board thus concluded:

> "Locking out employees in order to replace them with other workers may hardly be viewed as equivalent to the defensive action of a shutdown to preserve the solidarity of the Association unit. On the contrary, since the Respondents were continuing to operate and since

[3] It is noted that there were other employees in the stores who were not members of the bargaining unit who were not locked out.

[4] In its decision, the Board never conceded even that the initial lockout by respondents was legal. In fact the clear implication of the Board's decision is that the lockout followed by the use of temporary replacements converted the lockout itself into an illegal act.

> no reason appears why they could not have continued to operate with their own employees during the strike, this constitutes a temporary replacement of employees solely because they were engaging in protected concerted activity, i.e., striking against Food Jet." (R. 25).

As the Court of Appeals and the two dissenting Board members noted, this view "renders largely illusory the right of lockout given them by the Supreme Court in *Buffalo Linen*." Indeed, in the Board's view this right is rendered meaningless if respondents find they must, because of economic necessity, continue to operate.

It is obvious that if the struck employers may hire temporary replacements but the other employers must remain closed, the struck employer is given a significant economic advantage. The Board recognizes the problem, suggests that the cure is to continue operations with regular employees and embellishes its suggestion with the thought that there is really no economic reason for employers not to do this. This argument patently fails to take it into account that the respondents' decisions to remain open on a makeshift basis were made with a view toward protecting the bargaining unit as well as neutralizing their competitor's advantage. If respondents cannot lockout and use temporary replacements—at least to the extent done here—then the employers have no real protection from the effects of the whipsaw strike. To continue to operate during a whipsaw strike with regular employees obviously places the employers in the intolerable position of financing the strike which has as its objective the devastation of the bargaining

unit. Furthermore, as discussed more fully below, serious problems would arise if respondents attempted to continue operations with their regular employees. Would they be required to use all of their regular employees? If not, how is the selection to be made? Assuming these problems could be hurdled, moreover, an employer still would face the probability of being picketed with the result that its regular employees would leave, probably at a time of peak business activity. Restricting employers to the use of regular employees, who may be called out on strike or who would leave their jobs if the employer suddenly became the object of the whipsaw, would only add to the employer's problems in attempting to defend against it. The law permits the struck employer to engage in "self help" and to insulate its business from the worst effects of the whipsaw by allowing it to replace its striking employees; other members of a multi-employer bargaining unit against which a strike has been called, therefore should also be permitted to engage in "self help" and likewise to insulate themselves from the business destroying effects of the whipsaw. This simply cannot be done if the only way these employer members can operate their businesses is to attempt to do so with their regular employees.

It is obvious that an employer would be at the mercy of the union, particularly at peak business hours when the store is full of customers, if it must depend on the services of its regular employees in the event of a whipsaw. The same problem of course exists with respect to the stocking and protection of store inventories, the unloading of incoming

shipments, and the fulfillment of various kinds of contractual commitments. It is sheer folly to presume that an employer could continue to operate with this regular employees under such circumstances, particularly where the whipsaw—and it must be presumed that the union would use this vicious tool to its most effective and destructive end—might be shifted at short and varying intervals from employer to employer. How could an employer possibly protect himself under such circumstances if he had to depend wholly upon his regular employees, who, as members of the union, are not mere innocent bystanders but actual parties to the whipsaw strike against the employer group. There thus is sound economic reason for the non-struck employers not to operate with their regular employees.

E. The Board's "economic parity" theory is wholly unworkable.

In its decision and in its brief before the Court of Appeals, the Board took the position that respondents had the choice of either closing down completely or continuing normal operations. It now appears from its brief filed with this Court that the Board has reappraised the position of the non-struck members of a multi-employer group which is the object of a whipsaw strike and has "delicately" rebalanced the conflicting interests to some extent.

Thus, at this late date the Board for the first time suggests that each respondent could have operated on an

economic parity with the other respondents and with the struck employer. In the Board's language:

> "In short, the non-struck employer members of an association can put themselves "in the same boat" as the struck member by shutting down entirely or, if the struck employer has reopened, by resuming their own operations with their regular employees — *either in full or to the extent deemed adequate to maintain a level of operations comparable to that of the struck employer.*" (Brief, p. 13, emphasis supplied)

This grotesque over-simplification seems to demonstrate clearly the Board's utter failure to grasp the problems faced by employers who must defend their businesses against the whipsaw strike. A few questions immediately suggest themselves: (1) Who will determine the *adequacy* of the employer's response to the whipsaw strike? Will it be the employer? the Board? this Court? (2) What is a *comparable* level of operations? May the non-struck employers continue to work the number of employees which equals the number of replacements hired by the struck employer? Or should the non-struck employer guess at the level of sales of the struck employer and strive for a level of sales for himself which would leave each with the same percentage of the market enjoyed before the strike? Is gross profit of each employer a relevant factor? Is net profit? (3) Can the non-struck employers remain open their usual number of hours daily if the struck employer maintains his usual business hours? Or should all employer members of the bargaining unit remain open the same number of hours daily during the strike? (4) Would

the non-struck employers be permitted to use all of their employees on a part-time basis, thereby engaging in a partial lockout? Or must they use some of their employees on a full-time basis, which would, of course, still constitute a partial lockout? (5) May the non-struck employers rotate the employees working? Or *must they favor* certain employees and risk being charged with making a discriminatory selection? Is lack of anti-union bias a defense to such a charge? It is not hard to imagine that if a non-struck employer tried to remain open using only a few of his regular employees he would soon be a victim of the whipsaw picket line. Assuming, *arguendo*, that "economic parity" were in the realm of the possible, it could in all probability be attained only if the competitors made agreements and understandings between themselves which would violate the federal antitrust laws. See, for example, *Jewel Tea Co. v. Associated Food Retailers of Greater Chicago, Inc.*, 331 F. 2d 547 (C.A., 1964), where an agreement between food retailers fixing opening and closing hours was held to violate the Sherman Act.

An "economic parity" rule would in all probability require the number of employees used by the non-struck employers to change constantly depending upon the number of temporary employees working for the employer or employers being picketed. The problem is further compounded when more than one employer is picketed. How could the remaining non-struck employers ever arrive at any notion of parity? The Board completely ignores the fact that the picket line could, and probably would have shifted at short

intervals, possibly several times daily, with the only certainity being that the picketing would be at the inconvenience and hardship of the employers. It staggers the imagination to think of the problems involved in trying to determine and maintain "economic parity" in the face of a rapidly shifting picket corps. Economic parity would be nothing more than a game of musical chairs with the union playing the tune. It is demonstrably false to assume that economic parity could be maintained in the context of the shifting and changing whipsaw picketing tactics used against the members of a multi-employer bargaining unit.

Respondents submit that the yardstick to be used to measure the non-struck employers' conduct following a legal lockout is not the Board's concept of "economic parity" between the employers, who are, after all, commercial antagonists, but whether the employers have engaged in reasonable "self help." Respondents further submit that the facts clearly show that they did no more than that here.

> "It is apparent that the power of a union to initiate a strike which calls out all the employees in an entire or substantial part of an industry is no more than equalled by the power of the employers to lock out temporarily all or a substantial part of such employees." *Leonard, et al v. N.L.R.B.*, 205 F. 2d 355 (9th Cir.).

Respondents, with the exception of Safeway, were small, independent merchants. Each was faced with the necessity of protecting his perishable inventories, his business and the integrity of the bargaining unit, and more important, furnishing food to the community. Each, acting independently of the other, operated on a makeshift basis

as best he could, principally with supervisory help and relatives of management. Surely respondents' actions were "defensive" and not "retaliatory." The defense employed by respondents—the limited operation of their stores—was certainly moderate and reasonable. If respondents had waited to be "picked off" one at a time at the convenience of the Union, they would have, particularly in view of their perishable inventories, courted economic disaster.

F. Other considerations

There are, finally, other practical aspects of this case that the Board apparently did not take into consideration. What happens to other employees not in a bargaining unit if the employers must shut down their entire operations?[5] A complete shut down increases industrial strife and inflicts hardships upon people who are not parties to the labor dispute and who have no control over its settlement.

Many multi-employer groups have labor contracts covering various separate bargaining units, such as craft groups, maintenance employees, truck drivers, technical or professional employees performing specialized services or employees performing services in integrated or interdependent manufacturing operations—the number and kind of services are almost limitless. In many instances employers could not continue operations if they were re-

[5] In this case, neither meat department employees, nor supervisory personnel were members of the bargaining unit. All of these personnel continued to work during the lockout. Had respondents not continued operations, these employees would have been laid off and unable to work although they were not parties to the strike action and had no control over its settlement.

quired to lock out all employees in the bargaining unit and were prohibited from using temporary replacements. It would thus become necessary to shut down the operations of all employers in the unit, an act leading to the temporary unemployment of possibly hundreds or thousands of other employees who were not parties to the labor dispute and who had no control over its settlement. Such a result is, of course, opposed to the avowed objectives of the Wagner Act, Taft-Hartley Act, and the amendments of 1959.

Respondents also suggest that the Board majority misinterprets the meaning of "proper balance" in the context of this case when it attempts to equate or balance the economic power of an international union with that of the members of a small multi-employer bargaining unit. It is sheer folly to speak of a proper "balance" in terms of the number of employers and employees covered by the bargaining unit. It is common knowledge that today international unions stand behind and lend aid, financial and otherwise, to their affiliated unions. In many instances international unions, through the parent A.F.L.-C.I.O. organization, or through other mutual undertakings, contribute aid to each other. Today international unions stand prepared to wage successful strikes, regardless of their duration. Strike funds, or "war chests" as they are sometimes called, are maintained or raised as needed. Funds retained by international unions are frequently made available to affiliated local unions.

Respondents urge that they did no more than engage in reasonable "self help" and that the Board's argument that

it properly balanced the conflicting interests is without merit.

QUESTION THREE RESTATED

Whether, assuming the Court upholds the Board's conclusions, the Board's order is too broad because it imposes upon respondents the obligation to pay full back pay to all employees locked out rather than directing the payment of back pay only for those employees actually replaced in their jobs during the lockout.

SUMMARY OF ARGUMENT

The Board's order is too broad insofar as it orders reinstatement with back pay for all employees locked out by respondents rather than in ordering reinstatement with back pay only for those employees actually replaced during the lockout.

ARGUMENT

Respondents urge, assuming that their attempts to operate on a limited basis during the strike and lockout are found to be illegal, that the Board's order is too broad in that it requires back pay for all locked out employees, regardless of whether they were temporarily replaced.

In view of the fact that respondents' original lockout was privileged, it would normally follow that only those employees who were discriminated against by actual replacement after the lockout would be entitled to back pay. Moreover, respondents urge that employees replaced by super-

visory employees and other employees on the payroll who were temporarily brought in from other locations are not entitled to back pay.

It would be manifestly unjust, in light of the fact that there were only limited operations with fewer than the normal number of employees, to order that all locked out employees are entitled to full back pay, irrespective of whether they were replaced. This type of back pay award would, obviously, place an onerous and grossly unfair financial burden on respondents who have already suffered financial losses.

CONCLUSION

For the foregoing reasons, respondents urge that the opinion of the Court of Appeals is correct and should be affirmed.

Respectfully submitted,

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Copies of Respondents' Brief have been served on the Solicitor General and the General Counsel of the National Labor Relations Board by mail.